

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID SHARPE MARSHALL,

Plaintiff,

v.

WILLIAM KUBITZ and ANTHONY
RIVAS,

Defendants.

No. C 06-0754 PJH (PR)

**ORDER GRANTING
DEFENDANTS' MOTION
TO DISMISS**

This is a case filed pro se by a federal prisoner pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The events giving rise to the case occurred at the Federal Detention Center in Dublin, California, but plaintiff subsequently was transferred to the federal facility in Stafford, Arizona, where he attempted to exhaust his claim, and now is housed at the Terminal Island facility in Washington.

Defendants have filed a motion to dismiss. Plaintiff has filed several oppositions to the motion and a number of other motions. The motions are ready for decision.

DISCUSSION

I. Plaintiff's Motions

Plaintiff has filed a motion for leave to amend. He acknowledges that he does not need leave, but asks to be allowed to amend the complaint without reproducing the allegations of the original complaint. That is, it is not really a motion for leave to amend but rather is a motion to be allowed to amend without including all claims in an amended complaint. The general rule is that an amended complaint completely replaces the original complaint. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). As a result, all

1 claims and defendants must be included in an amended complaint or they are deemed to
2 have been abandoned. See *id.* (defendants not named in an amended complaint are no
3 longer defendants); *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir. 1981) ("[A]
4 plaintiff waives all causes of action alleged in the original complaint which are not alleged in
5 the amended complaint."). Plaintiff wishes to add two defendants, but because the
6 allegations about them contained in the motion are not sufficient to state a claim against
7 them, allowing the amendment in this unorthodox way would be futile. The motion will be
8 denied.

9 Plaintiff also moves for leave to ask more interrogatories of defendant Kubitz than
10 are permitted by Rule 33(a) of the Federal Rules of Civil Procedure. As plaintiff has not
11 made a sufficient showing of the need for the additional interrogatories, the motion will be
12 denied.

13 Plaintiff's motions for leave to file two affidavits (which have been provided) and to
14 correct dates of events will be granted. His motions for extensions of time to file his several
15 oppositions to the motion to dismiss and many documents in support of the oppositions will
16 be granted and the filings deemed timely.

17 **II. Defendants' Motion to Dismiss**

18 Defendants' motion to dismiss is grounded in part on plaintiff's alleged failure to
19 exhaust his administrative remedies.

20 **A. Legal Standard**

21 The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide
22 that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983],
23 or any other Federal law, by a prisoner confined in any jail, prison, or other correctional
24 facility until such administrative remedies as are available are exhausted." 42 U.S.C. §
25 1997e(a). Although once within the discretion of the district court, exhaustion in prisoner
26 cases covered by § 1997e(a) is now mandatory. *Porter v Nussle*, 122 S. Ct. 983, 988
27 (2002). All available remedies must now be exhausted; those remedies "need not meet
28 federal standards, nor must they be 'plain, speedy, and effective.'" *Id.* (citation omitted).

1 Even when the prisoner seeks relief not available in grievance proceedings, notably money
2 damages, exhaustion is a prerequisite to suit. *Id.*; *Booth v Churner*, 532 U.S. 731, 741
3 (2001). Similarly, exhaustion is a prerequisite to all inmate suits about prison life, whether
4 they involve general circumstances or particular episodes, and whether they allege
5 excessive force or some other wrong. *Porter*, 122 S. Ct. at 992.

6 A federal prisoner must exhaust his administrative remedies with the BOP before
7 filing a *Bivens* claim in federal court. 42 U.S.C. § 1997e(a); *Lunsford v. Jumao-As*, 155
8 F.3d 1178, 1179 (9th Cir. 1998), *overruled on other grounds by Booth v. Churner*, 532 U.S.
9 731 (2001). A federal prisoner may seek formal review of an issue that relates to any
10 aspect of his imprisonment under 28 C.F.R. § 542.10. The procedure requires that the
11 prisoner first address his complaint to the institution staff. 28 C.F.R. § 542.14(c)(4) (1997),
12 Form BP-9. If dissatisfied with the response at that level, the inmate may appeal his
13 complaint to the regional Director of the Bureau of Prisons ("BOP"). *Id.* § 542.15(a), Form
14 BP-10. Finally, the prisoner may appeal his case to the General Counsel in the Central
15 Office of the BOP, which is the "final administrative appeal." *Id.*, Form BP-11.

16 Nonexhaustion under § 1997e(a) is an affirmative defense. *Wyatt v Terhune*, 315
17 F.3d 1108, 1119 (9th Cir 2003). It should be treated as a matter of abatement and brought
18 in an "unenumerated Rule 12(b) motion rather than [in] a motion for summary judgment."
19 *Id.* (citations omitted). In deciding a motion to dismiss for failure to exhaust administrative
20 remedies under § 1997e(a), the court may look beyond the pleadings and decide disputed
21 issues of fact. *Id.* at 1119-20. If the court concludes that the prisoner has not exhausted,
22 the proper remedy is dismissal without prejudice. *Id.* at 1120.

23 **B. Analysis**

24 There is a record of only one grievance going to the issue in this case. It was filed
25 after plaintiff had been transferred to a federal institution in Stafford, Arizona, and he filed it
26 at the wrong (regional) level, rather than first filing at the institution level, and did not pursue
27 it to the final level, the General Counsel's Office. See Decl. Burks at ¶¶ 6-8. It thus was
28 not sufficient to exhaust because it did not comply with the Bureau of Prisons rule that such

1 appeals must be started at the local level. See 28 C.F.R. § 542.14(c)(4) (1997), Form BP-9
2 (complaint must first be addressed to institution staff); *Woodford v. Ngo*, 126 S. Ct. 2378,
3 2382 (2006) (the PLRA's exhaustion requirement cannot be satisfied "by filing an untimely
4 or otherwise procedurally defective administrative grievance or appeal."); *Bailey-El v.*
5 *Federal Bureau of Prisons*, 2007 WL 2461764, *2 (3rd Cir. Aug. 29, 2007) (quoting 28
6 C.F.R. § 542.15(b)(2), which governs appeals of grievances; "[a]n inmate may not raise in
7 an Appeal issues not raised in the lower level filings."). Furthermore, it was insufficient to
8 exhaust because it did not comply with the Bureau of Prisons rule that requires appeals to
9 be exhausted through the final, general counsel, level. See 28 C.F.R. § 542.15(a), Form
10 BP-11 (appeal to General Counsel in the Central Office of the BOP is the "final
11 administrative appeal."); *Mullins v. United States*, 2007 WL 2471117, *12 (N.D. W.Va. Aug.
12 30, 2007) ("An inmate is not deemed to have exhausted his administrative remedies until
13 he has filed his complaint at all levels.").

14 Plaintiff contends that his failure to pursue an administrative appeal through the final
15 level should not matter because (1) his grievances were not processed by the institution;
16 and (2) he exhausted by way of his multitudinous complaints and letters to various
17 authorities.

18 With regard to the latter, plaintiff's contention that he exhausted by "alternative
19 means" carries no weight when he failed to exhaust using the normal means – as long as
20 that route for exhaustion remains unused, there are "administrative remedies [that] are
21 available" which have not been exhausted.

22 Plaintiff's other contention is that officials blocked his attempt to use the normal
23 official route to exhaust. He contends this is proved by the copies of several first-level
24 grievances he has provided. See Pl.'s Exh. (doc 33) F1 - F4 & G1-G4. These grievances
25 carry initials and dates at the top of each, which plaintiff contends prove that he turned
26 them in to defendant Rivas at the first level. *Id.* Defendant Rivas says in a Second
27 Declaration that the initials are indeed his, but that he initials and dates each blank
28 grievance form he gives to inmates who ask for one after having attempted informal

1 resolution, to allow assessment of the timeliness of the grievance and to show that he has
2 completed the informal exhaustion part of the process within the three days which are
3 allowed. Decl. Rivas 2d at 1-2. He says that is why the forms provided by plaintiff have the
4 initials and dates on them. *Id.* at 1-2. That is, according to defendants the initials and
5 dates do not prove the grievances were actually turned in at the first level.

6 There thus is a factual dispute as to whether the authorities prevented plaintiff from
7 filing his grievances at the first level. Although the court has the power in ruling on an
8 unenumerated 12(b) motion such as this to resolve factual issues, that need not be done
9 here for two reasons. First, plaintiff does not dispute the factual allegation by Rivas that he
10 could have filed his grievances by giving them to any employee to forward to the warden's
11 secretary, who is the Administrative Remedy Clerk, or could have mailed them to the
12 warden's secretary, thereby by-passing Rivas, and did not do so. See *id.* at 2-3. That is,
13 the factual dispute need not be resolved because plaintiff had the option of filing his
14 grievances in another manner and chose not to take it. Second, even assuming the truth of
15 plaintiff's allegation, that he was prevented from pursuing a first-level appeal, that would
16 only serve to excuse his filing a first-level appeal; it would not excuse his filing the other two
17 appeals required by the BOP rules. Indeed, he did file a second-level appeal, at a different
18 institution, and he provides no reason for not filing a third-level appeal at that institution.

19 The court finds that plaintiff was not prevented from exhausting and concludes that
20 he did not exhaust all his administrative remedies. The motion to dismiss will be granted.

21 CONCLUSION

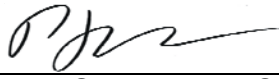
22 Plaintiff's motion to file affidavits (document number 21) and his motion for
23 corrections (document 23) are **GRANTED**. His motion to amend (document 7), treated as
24 a motion to amend without reproducing all claims, and his motion for leave to file additional
25 interrogatories (document 9) are **DENIED**. His motions for extensions of time (documents
26 31 and 34), to the extent they refer to documents which have now been filed, are
27 **GRANTED** and the filings are deemed timely.

28 Plaintiff's motion to dismiss (document number 11) is **GRANTED**. The case is

DISMISSED without prejudice. This order terminates all pending motions. The clerk shall close the file.

IT IS SO ORDERED.

Dated: September 17, 2007.



PHYLLIS J. HAMILTON
United States District Judge

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